

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROSA M. LUNA

Claimant

VS.

UNIFIRST CORPORATION

Respondent

AND

CHARTIS CASUALTY COMPANY

Insurance Carrier

Docket No. 1,058,201

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) and claimant requested review of the December 6, 2012, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. John B. Gariglietti, of Pittsburg, Kansas, appeared for claimant. Matthew J. Stretz, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found it was more probably true than not true that claimant was injured on May 10, 2011, while working for respondent and that her injury arose out of and in the course of her employment. The ALJ, however, also found claimant failed to give respondent timely notice of her injury and denied her request for medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 26, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that she failed to give respondent timely and appropriate notice of her accident or series of accidents. Claimant argues she suffered a series of accidental injuries each and every day worked ending May 10, 2011.

Respondent requests review of the ALJ's finding that claimant sustained an injury that arose out of and in the course of her employment. Respondent contends claimant failed to prove she sustained a work accident. In the event claimant did sustain a work-related injury, her date of injury would be May 10, 2011. Respondent denies that claimant proved she sustained a series of accidents and argues if the Board finds claimant sustained a series of accidents, the accident date would be the last day worked, June 24, 2011. In either event, respondent denies claimant provided it with timely notice of her accident or series of accidents.

The issues for the Board's review are:

1. Did claimant provide respondent with timely and appropriate notice of her accident or series of accidents?
2. Did claimant sustain an injury that arose out of and in the course of her employment?

FINDINGS OF FACT

Claimant worked as a supervisor for respondent, a company that launders and irons uniforms. Claimant claims she suffered injuries to her right shoulder, both arms, both hands, both wrists, and all other parts of the body affected, in a series of accidents each and every day worked ending May 10, 2011.¹

Claimant has worked for respondent for 23 years. Claimant acknowledged she suffered work-related injuries to her hands from a series of accidents several years ago. Claimant had carpal tunnel release surgery on her right hand. She could not remember when her previous workers compensation claim was concluded but said it was when the company was still known as Western Uniform. When claimant returned to work after her surgery, her supervisor, Walt, allowed her to perform light-duty work folding towels and training employees. Claimant testified when Walt retired five or six years ago, David Ricks took over his position. Claimant said her job duties remained the same a couple years after that, but Mr. Ricks gave her extra duties, including hanging wet clothes on a line, which forced her to lift her arms above her head, as well as getting clothes out of the washer or dryer and doing the ironing.

Claimant continued to experience pain after Mr. Ricks became her supervisor and believes the duties she was required to perform caused her to have new injuries. Claimant now has pain in her shoulders and arms, especially on the right. She has pain in both hands and wrists and in her right elbow. Claimant said the pain in her hands is not the

¹ Form K-WC E-1 Application for Hearing filed October 25, 2011.

same as the pain she had with carpal tunnel syndrome. Claimant testified the pain is now worse than it was before.

On May 10, 2011, claimant sustained an accident at work. Claimant alleges that she was working with some clothes that were hanging on a line when the pole she was holding came down on her right arm. Claimant felt immediate pain, but did not report the injury to respondent. Claimant testified she had pain in her right shoulder before the clothes fell on her arm on May 10, 2011, because of the hard work she was performing. On May 10, 2011, the pain was especially strong. Claimant made an appointment on her own to see Yeni Rodriguez, a physician assistant for Dr. Stuart Dismuke. She told Mr. Ricks that she was going to a doctor, but she did not tell him she had been injured at work. She testified she thought the problem she was having was the same as before because the pain was in her right arm.

Claimant said Ms. Rodriguez sent her to a specialist, Dr. Brennan Lucas, who ordered an MRI, which was performed on May 11, 2011. The MRI showed a “[c]hronic appearing full thickness rotator cuff tear.”² Claimant still did not report the accident to respondent, saying she did not know if her condition was from her first accident.

Claimant testified that three or four days after she had the MRI, she told her immediate supervisor, Jeff Hader, that the pole had fallen on her and she was in a lot of pain. Claimant admits this “was just a comment I made, and they didn’t pay much attention to that.”³ Claimant said Mr. Hader did not believe her. She said he made no comment to her after she made the statement.

After the accident of May 10, 2011, claimant returned to work performing the same duties she was doing at the time of her accident. Claimant was terminated from her employment at respondent on June 24, 2011.

David Ricks, respondent’s plant manager, testified that he worked with claimant for 8 to 8 ½ years. He confirmed that claimant was terminated on June 24, 2011, for reasons not connected with her workers compensation claim. He said claimant’s niece was with claimant when she was terminated, and the niece made a comment upon leaving the office that it “won’t be the last you will hear from us.”⁴ Mr. Ricks testified claimant did not report an injury in May 2011. Claimant had not discussed a problem with shoulder pain with Mr. Ricks before she filed her workers compensation claim. She never told Mr. Ricks there was a problem where she was working that made it physically difficult for her to work.

² P.H. Trans., Resp. Ex. 9

³ P.H. Trans. at 25.

⁴ *Id.* at 44.

Jeff Hader, claimant's immediate supervisor, stated in an affidavit that claimant did not report any work injury to him at any time in 2011.

Respondent entered as exhibits to the preliminary hearing some medical records of claimant's treatment before the incident on May 10, 2011. A report of Dr. Hector Fernandez from June 2004 indicates claimant saw him complaining of right shoulder and right hip pain. Claimant was diagnosed with arthritis and bursitis. In November 2007, claimant saw Dr. George Lucas as a follow-up to her carpal tunnel release surgery. At that time claimant was complaining of pain from the base of her right thumb, into her index finger, up to her elbow, and into her right shoulder. In examining claimant, Dr. Lucas noted she had full range of motion of the right shoulder with some pain on elevation and with an impingement test. Dr. Lucas diagnosed right rotator cuff tendonitis and prescribed physical therapy for rotator cuff rehabilitation. On January 19, 2011, claimant was seen by Dr. Rodriguez, complaining of pain in her right shoulder, hand and index finger. On April 29, 2011, claimant again saw Dr. Rodriguez, who noted claimant had limited range of motion of her right shoulder.

Claimant's attorney sent claimant to Dr. George Fluter for an independent medical examination, which was performed on January 17, 2012. Dr. Fluter diagnosed claimant with right shoulder pain, impingement, tendonitis and bursitis; medial and lateral epicondylitis of the right elbow, bilateral DeQuervain's tenosynovitis; right carpal tunnel syndrome; and myofascial pain affecting the neck, upper back, upper shoulders and scapular stabilizers. Dr. Fluter opined:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Ms. Luna's current condition and the reported injury occurring on or about 05/10/11.⁵

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-520 (Furse 2000) states:

⁵ P.H. Trans., Cl. Ex. 1 at 3.

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2011 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

....

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

In weighing the conflicting testimony and determining the respective credibility of the witnesses, the Board takes into consideration that the Administrative Law Judge had the opportunity to personally observe the testimony. In this respect, she had the unique opportunity to observe their demeanor and assess their credibility. Therefore, the Board gives some deference to the findings and conclusions of the Administrative Law Judge in this regard.

The issue of whether claimant gave timely notice of the injury comes down to credibility. The ALJ chose not to believe the claimant. This is understandable for a variety of reasons. When asked about treatment to the right shoulder in 2004, claimant testified that the treatment was for carpal tunnel, not the shoulder. Dr. Fernandez' record dated June 2004 reflects that claimant complained of pain in the right shoulder. Claimant could not recall Dr. Lucas' diagnosis of right rotator cuff tendonitis in 2007. Dr. Lucas' record of an examination of claimant on November 21, 2007, shows a diagnosis of rotator cuff tendonitis. Dr. Lucas referred claimant to Novacare for physical therapy on the right shoulder. Claimant actually participated in physical therapy with Novacare in December 2007, but did not remember.

Claimant testified that she did not see Ms. Rodriguez for her arm until May 2011. Claimant denied reporting right shoulder pain to Ms. Rodriguez in January 2011. Ms. Rodriguez' record of January 19, 2011, confirms claimant was examined for complaints of, among other things, right shoulder pain, right knee pain and right index finger pain. Claimant was referred to Dr. Prohaska, an orthopedic surgeon, as the result of this examination. Claimant even denied remembering seeing Ms. Rodriguez at Dr. Dismuke's office one month before the alleged work related injury. On April 29, 2011, claimant saw Ms. Rodriguez and noted tenderness of the right shoulder joint. Ms. Rodriguez ordered right shoulder and knee x-rays. Claimant's poor memory sheds doubt on her veracity.

Respondent offered the affidavit of Jeff Hader. Mr. Hader swore that claimant did not report a work injury to him at any time in 2011. Respondent offered the testimony of David Ricks at the preliminary hearing. Mr. Ricks testified that claimant did not report an accident and agreed that he did not know about the alleged injury until the claimant filed her claim for compensation on October 3, 2011.

CONCLUSION

Giving due deference to the findings of the Administrative Law Judge together with the testimony of the witnesses and the exhibits admitted into evidence, this Board Member finds that at this point in the proceedings, the preponderance of the credible evidence supports the conclusion that proper notice was not timely given for a single accident occurring on or a series of accidents through May 10, 2011, or series of accidents through June 24, 2011. The issue of whether the alleged accidental injury occurred in the course of and arises out of claimant's employment with respondent is moot.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated December 6, 2012, is affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

c: John B. Gariglietti, Attorney for Claimant
wlp@wlphalen.com

Matthew J. Stretz, Attorney for Respondent and its Insurance Carrier
mstretz@fsqlaw.com
lburns@fsqlaw.com

Nelsonna Potts Barnes, Administrative Law Judge

⁶ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).